# RECENT CASES.

BILLS AND NOTES—INDORSEMENT—GUARANTEE INDORSED ON NOTE—The words, "For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due," were written on the back of a promissory note and signed by the payee. *Held:* These words constitute a mere guarantee of payment, and not an indorsement in due course. Ireland v. Floyd, 142 Pac. Rep. 401 (Okl. 1914).

The authorities are in conflict as to the effect of a guarantee written on the back of a negotiable instrument by the holder. A majority of the decisions are in harmony with the rule followed by the court in the principal case. Taylor v. Binney, 7 Mass. 479 (1811); Snevily v. Ekel, 1 W. & S. 203 (Pa. 1841); Central Trust Co. v. First National Bank, 101 U. S. 68 (1879). Consistently with this doctrine, a guarantee on the back of a note does not impose the broad mercantile responsibility of an indorsement. Belcher v. Smith, 61 Mass. 482 (1851), and gives to one claiming under it, as against parties antecedent to the guarantor, merely the rights of an assignee of an ordinary chose in action. Tuttle v. Bartholomew, 53 Mass. 452 (1847); Miller v. Gaston, 2 Hill, 188 (N. Y. 1842). *Contra* to the doctrine of the principal case, it has been held in a number of jurisdictions that a guarantee of payment indorsed on a negotiable instrument is equivalent to an indorsement, as understood by the law merchant. Partridge v. Davis, 20 Vt. 499 (1848); Savings Bank v. Hanna, 124 Iowa, 374 (1904).

The Negotiable Instruments Law does not provide in express terms for the case of a guarantee indorsement. See N. I. L. §63. A Michigan statute explicitly declares that a guarantee of payment is to be regarded as an indorsement in due course. Compiled Laws of Michigan, Vol. II, §4879; Green v. Burrows, 47 Mich. 70 (1881).

CONSTITUTIONAL LAW—DEPRIVATION OF LIBERTY—A State statute prohibited the carrying in parades of any red or black flag bearing any inscription opposed to organized government, or which is sacrilegious, or which may be derogatory to public morals. It was claimed that this statute was a deprivation of liberty without due process of law. *Held:* The statute was a valid exercise of the police power. Commonwealth v. Karvonen, 106 N. E. Rep. 556 (Mass. 1914).

The Fourteenth Amendment to the Constitution was not designed to interfere with the police power of the State, Barbier v. Connolly, 113 U. S. 27 (1884). Under certain conditions both the liberty and property of the individual may be subjected to an exercise of that power. Commonwealth v. Straus, 191 Mass. 545 (1906). The scope of the power is confined to the enactment of laws designed for the protection of the public safety, morals, health and welfare. Chicago, *etc.*, R. R., v. McGuire, 219 U. S. 549 (1910); Commonwealth v. Libbey, 216 Mass. 356 (1914). And is further limited to conditions reasonably requiring its exercise. Mutual Loan Company v. Martell, 222 U. S. 225 (1911); Commonwealth v. Riley, 232 U. S. 671 (1913); Mehlos v. City of Milwaukee, 156 Wis. 591 (1914). It is the settled policy of the courts to regard the legislature as the judge in the first instance of the conditions requiring an enactment, and to declare a statute unconstitutional only when the opinion of the legislature is plainly and palpably unreasonable. Mugler v. Kansas, 123 U. S. 623 (1887).

Statutes designed to promote maintenance of order cannot be stricken down as unconstitutional unless they manifestly have no tendency to produce that result. Commonwealth v. Jacobson, 183 Mass. 242 (1903); Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680 (1913). It would seem that the statute in the principal case cannot fairly be said to interfere unreasonably with the liberty of the citizens, nor can it be adjudged to have no rational connection with the preservation of public safety.

CONTRACTS—COMPROMISE OF DISPUTED CLAIM—A debtor tendered, in full settlement of a disputed claim, an amount less than that which the creditor claimed to be due. The creditor accepted. In an action for the balance it was held that the dispute was sufficient consideration to uphold the settlement. Hileman v. Maxwell, 149 N. W. Rep. 44 (Neb. 1914).

The doctrine of Foakes v. Beer, L. R. 9 App. Cases, 605 (Eng. 1884), that the payment of a lesser sum is no consideration for the relinquishment of a larger claim, is inapplicable where the larger claim is unliquidated, Wilkinson v. Byers, 1 A. & E. 106 (Eng. 1834); doubtful, Rosenthal v. Budwick, 78 N. Y. Supp. 415 (1902); or disputed, Bingham v. Browning, 97 Ill. App. 442 (1901). But the debtor's dispute as to the amount due must be made in good faith, Lumber Co. v. Brown, 68 Vt. 239 (1896). The mere fact that a contract for payment of money is in writing does not make the claim liquidated so as to render inoperative a settlement of the claim for a lesser amount, Bingham v. Browning, *supra*. Though an agreement to accept in full settlement a sum less than the amount claimed by one party and admitted to be due by the other is void for want of a sufficient consideration to support it, Raven v. Ins. Co., 106 N. W. Rep. 198 (Iowa, 1906), yet an agreement between a judgment creditor and an insolvent judgment debtor contemplating resorting to voluntary bankruptcy whereby the creditor is to take an amount less than the judgment as full satisfaction, is supported by a sufficient consideration, Haubers v. McCann, 76 Pac. Rep. 983 (Colo. 1904).

Prevention of a suit is a sufficient consideration for a compromise of a disputed claim, Battle v. McArthur, 49 Fed. Rep. 75 (1892), as is forbearance to prosecute proceedings for the reversal of a judgment obtained by a creditor. Gering v. School Dist., 107 N. W. Rep. 250 (Neb. 1906). Payment of a sum less than the whole amount, where the whole of the debt is not yet due is a sufficient consideration for the release of the whole debt. Russell v. Stevenson, 75 Pac. Rep. 627 (Wash. 1904). The acceptance by a creditor of a sum less than the amount of his claim will not operate as an accord and satisfaction, unless it is made known to the creditor that the money was tendered in full settlement of the entire claim. Harrison v. Henderson, 67 Kan. 194 (1903).

CONTRACTS—STATUTE OF FRAUDS—PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—One who had sold, but not yet shipped, a quantity of potatoes to a person who had a contract to furnish potatoes to a seed company, telephoned the company that, as he had heard reports of the vendee's doubtful financial standing, he would not ship the potatoes unless the company would agree to pay for them. An agent of the company replied that the company would pay if the vendee did not. The vendor thereupon shipped the potatoes directly to the company, and afterwards sued the latter upon the oral promise of its agent. *Held:* The promise was not within the Statute of Frauds, and need not be in writing, because the main purpose of the promisor was to secure a benefit to himself, and he did in fact secure such benefit. Colbath v. Clark Seed Co., 91 Atl. Rep. 1007 (Me. 1914).

The clause of the Statute of Frauds which requires a promise to answer for the debt, default or miscarriage of another to be in writing in order to render the promisor liable, has given rise to many conflicting decisions. Certain general rules, however, may be deduced. It is settled, except perhaps in Pennsylvania, that a promise to the debtor himself to pay his debt is not within the statute because it is not a promise to answer for the debt of "another"; the promise must be to the creditor. Eastwood v. Kenyon, 11 A. & E. 438 (Eng. 1840); Gill v. Ferrin, 71 N. H. 421 (1902). For the state of the law in Pennsylvania, see Fehlinger v. Wood, 134 Pa. 517 (1890); Sharp v. Levan, 236 Pa. 374 (1912). The promise being to the creditor, the general rule is well recognized that a collateral, not an original, promise is within the statute. Brown v. Reinberger, 177 Ill. App. 297 (1913); Enterprise Co. v. Bank, 167 S. W. 296 (Tex. 1914). The difficulty, however, is to determine what constitutes the one or the other. The intention of the parties at the time of making the promise must of course be regarded. Millsaps v. Nixon, 102 Ark. 435 (1912). In the principal case, the intention at least of the promisor,

judging from the form of his promise, was to pay only if the debtor himself did not. But the form of words is not conclusive; as said in Davis v. Patrick, 141 U. S. 479 (1891), "The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties." There is no universal test to ascertain the character of the promise. One view is that the promise is not within the statute when it is based on a new consideration which is of pecuniary benefit to the promisor. Durgin v. Smith, 115 Mich. 239 (1897); Munroe v. Mundy, 141 N. W. 819 (Ia. 1914). Other cases applying the new consideration test make no distinction whether it is a benefit to the promisor or a detriment to the promisee. Gainsville v. Hobbs, 153 N. C. 188 (1910); Windsor v. Ruland, 148 N. Y. S. 386 (1914). A third view, held by only a minority, is that if the promise of the third person discharges the liability of the debtor, the promise is original and not within the statute; but if the debtor's liability continues, the promise is collateral and must be in writing. Manheim v. Jones, 63 W. Va. 373 (1908). The principal case follows the so-called "main purpose" rule, laid down by the leading case of Emerson v. Slater, 22 How. 28 (U. S. 1859): when the leading object of the promisor is to subserve some interest of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

CRIMINAL LAW—DEFENSES—INSANITY—In a prosecution for murder, an instruction that if the jury found that the defendant had the mental disorder called "constitutional inferiority" and that such disorder carried with it a diminished degree of responsibility for the act, he could not be found guilty of murder in the first degree, was properly refused. Com. v. Cooper, 106 N. E. Rep. 545 (Mass. 1914).

The courts are clearly in conflict upon the question of the degree of insanity which is sufficient to excuse the commission of a crime. The English view, which is supported by a bare majority of American jurisdictions, is that the sole test of responsibility, when insanity is offered as a defense, is whether the accused could distinguish between right and wrong as to the particular act at the time it was committed. McNaghten's Case, 10 Clark & F. 200 (1843); Oborn v. State, 126 N. W. Rep. 737 (Wis. 1910). The other jurisdictions follow the English rule as far as it goes, and also take the further position that the accused is excused if he is impelled to do the act by an irresistible impulse, which is produced by some mental disease and affects the will, so that the person afflicted, while recognizing the wrongfulness of his act, yet cannot resist the impulse to do it. Parsons v. State, 81 Ala. 577 (1886); Taylor v. Com., 109 Pa. 262 (1885). Where the accused is laboring under an insane delusion, and hence is only partially insane, his act will be excused if the delusion and the act are connected in the relation of cause and effect and if he would have been excused had the facts been really as he supposed they were. Com. v. Rogers, 7 Metc. 500 (Mass. 1844).

Mere weakness of the mind or deficiency in will power is not sufficient to excuse the act. State v. Flowers, 58 Kan. 702 (1897). Nor does it seem that there should be various degrees of insanity, which will allow conviction of a smaller crime, but not of a larger one. So there is no degree of insanity sufficient to acquit of murder but not sufficient to acquit of manslaughter. U. S. v. Lee, 4 Mackey, 489 (D. C. 1886). However, it has been held that even where there was not a total want of responsibility, the prisoner's mind might be so impaired by disease or moral insanity that he would be incapable of a deliberate, premeditated murder, and so could not be convicted of murder in the first degree, but should be guilty of murder in the second degree. Anderson v. State, 43 Conn. 514 (1876). It does not appear in the principal case what "constitutional inferiority" is, but if it is merely a diminished degree of responsibility, then the principal case and Anderson v. State, *supra*, are flatly *contra*.

CRIMINAL PROCEDURE—MISCONDUCT OF COURT—ABSENCE OF PREJUDICE—The defendant, who had been found guilty of first degree murder, sought a new trial on the ground that trial judge showed hostility to the defendant's

counsel. *Inter alia,* the judge, without waiting for an objection to be interposed or an answer given to a question asked a witness by the defendant's attorney, said: "He has answered that . . . I will sustain an objection and make it myself. We have got to get through here some time." *Held:* "While the court might have expressed its rulings in a manner indicative of less impatience and less calculated to affect the sensibilities of counsel, it cannot be said . . . that this alone was sufficient to prejudice the rights of the defendant." People v. Svendsen, 142 Pac. Rep. 861 (Cal. 1914).

It is not improper for the court to caution, correct, admonish or even rebuke counsel, during trial, provided that a fair trial is not thereby prevented. Com. v. Coughlin, 182 Mass. 558 (1903); State v. Brown, 100 N. C. 519 (1888); Dailey v. State, 55 S. W. Rep. 821 (Tex. Cr. App. 1900). Comment by a judge upon the great amount of time being needlessly consumed by counsel is not ground for a new trial. Long v. State, 12 Ga. 293 (1852); State v. Veillon, 105 La. 411 (1900); State v. Duestrow, 137 Mo. 44 (1897). Unnecessary manifestation of impatience and reflection on the conduct of counsel is not a reversible error, where the verdict is responsive to the evidence. Tuttle v. State, 83 Ark. 379 (1907). Directing counsel to desist from an examination leading merely to a repetition of former answers is not a prejudicial error, notwithstanding that counsel is thereby placed in a ridiculous position before the jury. State v. Brown, 100 Ia. 50 (1896). "I do not think that is a proper examination" is not an improper remark where the questions asked are trivial and could elicit nothing of consequence. Lewis v. State, 90 Ga. 95 (1892).

A severe criticism of the methods of an attorney trying a case is ground for reversal. Peeples v. State, 103 Ga. 629 (1898). Thus, "Don't lead the witness . . . these ignorant witnesses can be led to say anything in the world you want them to say" is an improper remark. Jefferson v. State, 80 Ga. 16 (1887). Remarks tending to give jury the impression that counsel is asking foolish questions, when in fact they are material are prejudicial and ground for new trial. Nave v. McGrane, 19 Idaho, 111 (1910). A hostile attitude toward counsel during the trial is alone sufficient for reversal. People v. Mayer, 132 N. Y. App. Div. 646 (1909). A remark made by a judge in overruling an objection to evidence which tends to ridicule counsel constitutes error *per se.* State v. Clements, 15 Ore. 237 (1887); *contra,* State v. Teeter, 239 Mo. 475 (1911), in which case, the trial judge stated that counsel was competent only to practice before a justice of the peace.

DECEIT—FRAUD—INVESTIGATION OF FACTS—REPORT—An agent, after a period afforded for investigation, reported that a contract was good security, when he had not investigated and had no knowledge concerning it. *Held:* The misstatement was not a mere matter of opinion, but of a fact of which he assumed to have knowledge, and his want of actual knowledge of its falsity is no defense. Scribner v. Palmer, 142 Pac. Rep. 1167 (Wash. 1914).

There is great confusion in the law as regards the defendant's want of belief in the truth of the fact asserted in an action of fraud and deceit. The English rule is that there is no liability unless the statement was made with knowledge of its falsity. An honest belief is a defense, whether a reasonable belief or not. Peek v. Derry, 14 App. Cases, 337 (Eng. 1889). Some American jurisdictions uphold a conviction where the statement is made under an honest belief but for which there are no reasonable grounds. Scholfield Pulley Co. v. Scholfield, 71 Conn. 1 (1898). Others follow England and regard the "reasonable grounds test" as merely evidence to determine whether there was an honest belief. Dilworth v. Bradner, 85 Pa. 238 (1877); Wimple v. Patterson, 117 S. W. Rep. 1034 (Texas, 1909); Kountz v. Kennedy, 147 N. Y. 124 (1895). Some courts draw the line at whether the defendant has benefited by the false representations. Halcomb v. Noble, 69 Mich. 396 (1888). Still others allow an action of deceit only upon actual knowledge of the falsity, but an action on the case for negligence where there are no reasonable grounds for belief. Cunningham v. Furnishing Co., 74 N. H. 435 (1908).

Statements of opinion as a general rule are not actionable, Lynch v. Murphy, 171 Mass. 307 (1898); Dalrymple v. Craig, 139 Mich. 211 (1905), but where the facts are not equally well known and the statement also amounts to one of fact, an action will lie. Smith v. Land and House Corporation, L. R. 28 Ch. Div. 14 (Eng. 1884). So also where one makes a statement as though from personal knowledge and where it is implied that he has ascertained the truth of what he says, all jurisdictions uphold an action if the statement is untrue, even though the defendant had an honest belief in its verity. Chatham Furnace Co. v. Moffatt, 147 Mass. 403 (1888); McDonald v. Smith, 102 N. W. Rep. 668 (Mich. 1905); Stearns v. Kennedy, 94 Minn. 439 (1905); *contra,* Page v. Bent, 43 Mass. 371 (1841). So also all jurisdictions, including England, hold that one is liable for "reckless statements," where the defendant states as a fact something of which he knows nothing. Hadcock v. Osmer, 153 N. Y. 604 (1897). Whether a representation is to be taken as an assertion of personal knowledge or as a strong expression of opinion depends on the nature of the subject matter and the relation of the defendant to it. Shelton v. Healy, 74 Conn. 265 (1900); Cawley v. Smyth, 46 N. J. L. 380 (1884); Watson v. Jones, 41 Fla. 241 (1899). The modern tendency, especially in the West, is to hold the maker of false representations to a stricter account. Grant v. Huschke, 74 Wash. 257 (1913).

DECEIT—FRAUD—RELIANCE ON FALSE REPRESENTATION—Plaintiff seeks damages for fraud and deceit perpetrated upon him in the purchase of a panorama. Alleged misrepresentations were that the panorama's earning capacity was $20 per day. Before buying the machine, the plaintiff exhibited the panorama and the receipts were but $12.50 per day. *Held:* That if the plaintiff availed himself of the opportunity to test the truth of the representations made and discovers prior to the consummation of the contract that such representations were false, he will not be heard to say that he was deceived by them. Gratz v. Schuler, 142 Pac. Rep. 899 (Cal. 1914).

Many cases, particularly the early ones, lay down the broad doctrine that, if the defrauded party has the means of knowledge at hand, he has not been deceived by the defendant's misrepresentations because, as a prudent man, he must be deemed to have availed himself of such means. Shepard v. Goben, 142 Ind. 318 (1895); Brown v. Leach, 107 Mass. 364 (1871). But one is not prevented from recovering because he did not make inquiry concerning the matter, if inquiry was prevented by the other party's artifice. McMillen v. Hillman, 118 Pac. Rep. 903 (Wash. 1911). The more recent cases, in accordance with the principal case, tend to hold that there is no conclusion of law that the plaintiff did avail himself of such means of knowledge or that it was his duty to do so, and, consequently, he may still show that he was misled by the defendant's misrepresentations. Bigelow on Torts (8th ed.), p. 92; King v. Livingston Manufacturing Co., 60 So. Rep. 143 (Ala. 1912); Yanelli v. Littlejohn, 137 N. W. Rep. 723 (Mich. 1912). And the doctrine of the recent cases is specially applicable when there is active, positive fraud. Linington v. Strong, 107 Ill. 295 (1883). However, if the party defrauded institutes inquiry for himself and ascertains the truth, he cannot rely upon the falsity of such representations. West End Real Estate Co. v. Claiborne, 97 Va. 734 (1900).

EVIDENCE—ADMISSIONS—SILENCE—The defendant was confined in prison with his wife, who had been convicted of murder, to be tried for the same offence. At his trial, fellow-prisoners were permitted to testify that they had heard the wife charge him with having compelled her to kill the deceased, and that the defendant had not denied it. *Held:* This evidence is not admissible as an admission of the defendant's guilt. Riley v. State, 65 So. Rep. 882 (Miss. 1914).

The court in this case put their decision on the ground that because of the relationship existing between them, a husband is not called upon to deny the statement of his wife. In State v. Landisi, 90 Atl. Rep. 1098 (N. J. 1914), however, it was held that the fact that the charge was made by the

defendant's wife did not relieve him of the necessity of denying it. The general rule governing admissions implied by silence, is that any statements made in the presence of the accused under circumstances that call for a denial, if not denied by him, are admissible against him. Com. v. O'Brien, 179 Mass. 533 (1901). The accused must hear and fully comprehend the charge. People v. Conrow, 200 N. Y. 356 (1911); and must have been in a position to explain. Hanger v. United States, 173 Fed. Rep. 54 (1909). The question as to whether or not the defendant has heard it is for the jury. Com. v. Detweiler, 229 Pa. 304 (1910). When the accused is under arrest or in custody at the time the statement is made, authorities are not agreed as to whether evidence of his silence when charged is admissible. Some courts, following the Massachusetts rule, exclude the statement invariably. Com. v. Kenney, 12 Metc. 235 (Mass. 1847); Vaughan v. State, 42 L. R. A. 889 (Okla. 1911); but the better rule allows some flexibility according to circumstances. Com. v. Aston, 227 Pa. 112 (1910); State v. Booker, 68 W. Va. 8 (1910). See also: Wigmore on Evidence, Vol. II, §1072. In any case accused is at liberty to explain his silence. People v. Byrne, 160 Cal. 217 (1911). This rule is applicable in both civil and criminal cases. Kelley v. People, 55 N. Y. 565 (1874); but does not apply to silence at a judicial proceeding. People v. Willett, 92 N. Y. 29 (1883). See also: Jones on Evidence (2nd ed.), §290. Whether or not the circumstances are such as will give rise to an implied admission is a question for the court. People v. Byrne, *supra*. Such evidence should be received with caution and not unless clearly within the rule. People v. Conrow, *supra*. The weight of such evidence is for the jury. State v. Booker, *supra*.

EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY—Deceased had been mortally wounded by the accused. After saying that he wished to make a statement because he thought that he was dying, he charged the accused with the crime. *Held:* The evidence was properly admitted. Hawkins v. State, 142 Pac. Rep. 1093 (Okla. 1914).

The admission of dying declarations is an exception to the rule excluding hearsay and is founded upon the assumption that the consciousness of impending death is as potent an incentive for speaking the truth as the sanctity of an oath. Ashton's Case, 2 Lew. Co. C. 147 (Eng. 1837); Tracy v. People, 97 Ill. 101 (1880). The admission of such declarations is practically everywhere confined to cases of homicide. Thayer v. Lombard, 165 Mass. 174 (1896); but a recent case in Kansas, rejecting this limitation, admitted such declarations in a civil case, holding that the probability of truth, which was the reason for admitting them at all, was equally present in both cases. Thurston v. Fritz, 50 L. R. A. 1167 (Kan. 1914). Although not followed, in theory this view has some support. 2 Wigmore on Evidence, §1436. As emphasized in the principal case, consciousness of impending death is absolutely essential in such cases. The general rule is that the declarant must believe that death is certain and may not entertain even a slight hope of recovery at the time. Peak v. State, 50 N. J. L. 222 (1888); Com. v. Roberts, 108 Mass. 296 (1871). There seems, however, to be a modern tendency to hold that the mere realization of the possibility of a miraculous recovery does not disqualify the declaration. Peoples v. Com., 87 Ky. 487 (1888). It is generally held that the declarant's apprehension of death may be inferred from the seriousness of his condition coupled with statements on the part of declarant to that effect. Com. v. Abel, 91 Atl. 252 (Pa. 1914); and according to the better rule it can be inferred from the nature of the wound alone, without any such statement. Woodcock's Case, 1 Leach Cr. Cas. 500 (Eng. 1789); Kilpatrick v. Com., 31 Pa. 198 (1858), but in Reg. v. Morgan, 14 Cox Cr., 337 (Eng. 1875), it was held that no such inference of consciousness of approaching death could be inferred from the nature of the wound alone. Certain acts such as sending for a priest or spiritual adviser, People v. Buettner, 233 Ill. 272 (1908); sending for one's children, Rice v. State, 94 S. W. Rep. 1024 (Tex. 1906), have been held sufficient evidence of knowledge of impending death, and arranging business matters is a strong circum-

stancé indicating such consciousness. People v. Shehadey, 12 Cal. App. 648 (1910). But it has also been held that sending for a doctor by declarant is not an indication of hope. State v. Bordelow, 113 La. 690 (1904). The question as to whether or not declarant is in proper state of mind to make his declaration admissible is for the court. Kehoe v. Com., 85 Pa. 127 (1877).

EVIDENCE—PRESUMPTION OF DEATH FROM ABSENCE—If a person is continuously absent from home for a period of seven years or more, and is not heard from within that time by those who, if he were alive, would be likely to hear from him, a presumption arises that he is dead, and that he died during the first seven years of such absence, but not that his death occurred at any particular time during that period. McLaughlin v. Sovereign Camp, W. O. W., 149 N. W. Rep. 112 (Neb. 1914).

The presumption of death arising from the absence of a person for seven years without being heard from, has been for a long time firmly established. Doe v. Jesson, 6 East, 84 (Eng. 1805); Loring v. Steineman, 1 Metc. 204 (Mass. 1840); Burr v. Sim, 4 Whart. 150 (Pa. 1838). The presumption had its origin in the Statute of 1 James I, c. xi, relating to prosecutions for bigamy. That statute excepted from its provisions married persons who should re-marry after the continued absence of the former husband or wife for seven years without being known to the other party to have been living within that time. By what was really judicial legislation, the courts derived from this statute the present presumption of death from seven years' absence, and applied it not merely to bigamy cases, but universally. Some states have passed statutes on the subject, defining or limiting the presumption. Sovereign Camp, W. O. W., v. Ruedrich, 158 S. W. 170 (Tex. 1913); Bradley v. Modern Woodmen, 124 S. W. 69 (Mo. 1910). The presumption is not conclusive, but may be rebutted. Thus, absence for seven years will not raise a presumption of death if the absentee is a fugitive from justice. Mutual, *etc.*, Ins. Co. v. Martin, 108 Ky. 11 (1900); Winter v. Supreme Lodge, 96 Mo. App. 1 (1902). On the other hand, the presumption may arise, under certain circumstances, from an absence of less than seven years. For example, in Cox v. Ellsworth, 18 Neb. 664 (1886), evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, was held sufficient to raise a presumption of death though the supposed decedent had disappeared only five years before the suit.

By the great weight of authority, the presumption is confined to the fact of death, and does not extend to the time thereof. The time of the death is entirely a matter of evidence, and, if material, must be affirmatively proved by the party alleging it. Spahr v. Ins. Co., 98 Minn. 471 (1906); Security Bank v. Equitable Life Assur. Soc., 112 Va. 462 (1911). New York and Illinois, however, hold that the death will be presumed to have occurred at the end of the seven year period. Matter of Davenport, 75 N. Y. S. 934 (1902); Dickinson v. Donovan, 160 Ill. App. 195 (1912). The computation of the seven year period begins from the time the person was last heard from or known to be alive. Smith v. Combs, 49 N. J. Eq. 420 (1892); Morrow v. McMahon, 71 N. Y. S. 961 (1901).

EVIDENCE—PRIOR AND SUBSEQUENT ACTS—The defendant was indicted for statutory rape. *Held:* Evidence of similar subsequent acts of intercourse between the parties was admissible. People v. Thompson, 106 N. E. Rep. 78 (N. Y. 1914).

The doctrine is now well, if not universally, established that in prosecutions for adultery, seduction, statutory rape upon one under the age of consent, and incest, acts of sexual intercourse between the parties prior to the offense charged in the indictment may be given in evidence. Bass v. State, 103 Ga. 227 (1897); Boyd v. State, 81 Ohio, 239 (1909); State v. Schneller, 120 Minn. 25 (1913). The evidence in such cases is introduced to prove the defendant guilty of committing the act charged. People v. Koller, 142 Cal. 621 (1904); People v. Gray, 251 Ill. 431 (1911). Its admission is

based on the theory that it shows a disposition on the part of the defendant to commit such acts with the prosecutrix and hence that he is likely to indulge his passion whenever the opportunity is presented. State v. Briggs, 68 Ia. 416 (1886); People v. Edwards, 73 Pac. Rep. 416 (Cal. 1903). Undoubtedly, the difficulty of proving these charges because the prosecutrix is generally the sole witness has induced the courts to be more ready to accept the evidence. State v. Snover, 64 N. J. L. 65 (1899).

The authorities are not in harmony upon the further question whether acts subsequent to the date relied upon for conviction are admissible. The evidence is held admissible by several courts. Thayer v. Thayer, 101 Mass. 113 (1869); Crane v. People, 65 Ill. App. 492 (1896); People v. Carter, 133 Cal. 11 (1901); State v. Sebastian, 81 Conn. 1 (1908). The majority of courts, however, though admitting evidence of prior acts, exclude evidence of those occurring subsequent to the date charged in the indictment. People v. Fowler, 104 Mich. 449 (1895); Wiggins v. State, 84 S. W. Rep. 821 (Tex. Cr. App. 1905). Since the true ground of admission is that it shows a passion for this woman it should be immaterial whether this feeling was proved by previous or subsequent acts. King v. Iowa, 117 Ia. 484 (1902); Woodruff v. State, 72 Neb. 815 (1904).

LIBEL—REMEDY IN EQUITY—A bill in equity will not lie to enjoin the publication of a libel; the proper remedy is an action at law for damages. Finish Temperance Society Sovittaja v. Riavaaja Pub. Co., 106 N. E. Rep. 561 (Mass. 1914).

It is well settled in America that neither a final nor an interlocutory injunction will be granted to restrain libel on slander of title or reputation. The courts of equity in England also refused to exercise this power before legislation changed the rule. Singer Co. v. Domestic Co., 49 Ga. 73 (1873); Prudential Ass. Co. v. Knott, 10 Ch. App. 142 (1874); Kidd v. Horry, 28 Fed. Rep. 773 (1886). The reason for the rule in America is sometimes said to be that the granting of such an injunction would be repugnant to Article I, sec. 8 of the Constitution, which declares that every citizen may freely speak and write his sentiments on all subjects, being responsible for an abuse of that right; and that no law shall be passed to restrain or abridge the liberty of speech or of the press. Guardian Soc. v. Roosevelt, 7 Daly, 101 (N. Y. 1877); Life Assoc. v. Boogher, 3 Mo. App. 173 (1876). Injunctions to restrain libel have been granted in a few cases of alleged conflicting patents, where statements were made by one patentee concerning the business or right to the patent of the other party and where these statements were found to be libellous. The publication must be malicious as well as false and must be more than a mere statement that the plaintiff has no right to make and sell the article in question. Celluloid Mfg. Co. v. Goodyear Dental Co., 13 Blatchf. 375 (U. S. 1876); Craft v. Richardson, 59 How. Pr. 356 (N. Y. 1880).

In England, the power to grant such injunctions has been given by the Common Law Procedure Act of 1854 and the Judicature Act of 1873. The former gave the common law courts, when an action for damages had been instituted, the right to issue injunctions on such terms as appeared "reasonable and just." The Judicature Act vested the jurisdiction of the common law courts and the Court of Chancery to issue injunctions to restrain tort in one court, and provided that an interlocutory injunction could be granted whenever just and convenient. The power to issue a final injunction after the writing has been ascertained to be libellous is admitted beyond question and is freely exercised. Thorley's Food Co. v. Massam, L. R. 14 Ch. D. 763 (1880); Monson v. Tussands, L. R. 1 Q. B. 671 (1894). Nor is the power of the courts under the Judicature Act to grant an interlocutory injunction to restrain libel in any doubt, but the right has been very rarely exercised. To obtain such an injunction, it must be shown that the alleged libel was untrue, malicious, and injurious to the plaintiff's business, that it was sure to be repeated and that it was not privileged. Quartz Hill Mining Co. v. Beall, L. R. 20 Ch. D. 501 (1882); Bonnard v. Perryman, 2 Ch. 269 (1891). There are no statutes in America which grant this power.

MALICIOUS PROSECUTION—ELEMENTS—After the defendant's criminal charge against the plaintiff had been dismissed by a magistrate, the defendant appeared before a grand jury and sought to have the plaintiff indicted. *Held:* Assuming that the defendant's appearance before the grand jury is not of itself ground for an action for malicious prosecution, the jury may consider it in determining whether the original and actional arrest was malicious. Hart v. Leitch, 91 Atl. Rep. 782 (Md. 1914).

In civil cases there is a conflict as to what proceedings on the part of the defendant will furnish ground for an action for malicious prosecution. The more modern view, which probably represents the preponderance of authority, is that the action may be maintained for the prosecution, without probable cause, of any civil suit which terminates in favor of the plaintiff, the reason given being that the plaintiff has been wronged thereby and is entitled to redress. Allen v. Codman, 139 Mass. 136 (1885); O'Neill v. Johnson, 53 Minn. 439 (1893). See also: Cooley on Torts (3rd ed.), Vol. I, p. 349. A number of states, on the other hand, hold that no action will lie for civil prosecutions unless there is seizure of the person or property of the plaintiff. Meyer v. Walter, 64 Pa. 283 (1870); Smith v. Mich. Buggy Co., 175 Ill. 619 (1898); Paul v. Fargo, 84 App. Div. 9 (N. Y. 1903). The reason for this view given in Meyer v. Walter, *supra,* is that if plaintiff's person and property are not interfered with, he has not been damaged, and defendant is sufficiently punished by payment of costs. Some writers consider this the better view. See Newell on Malicious Prosecution, §10, also 30 Am. Law Reg. 281.

In criminal cases there is a wide diversity of opinion as to what proceedings constitute a prosecution. Probably the prevailing rule is that laid down in Haywood v. Cuthbert, 4 McCord, 354 (S. C. 1827). There, in holding that an information before a magistrate upon which no process issued was not an actionable prosecution, the court said: "A correct criterion by which to determine whether a prosecution has or has not been commenced will best be formed by inquiring whether the proceedings are in such a situation as to put it in the power of the party prosecuted to compel the state to proceed, or to procure his own discharge, which can never happen until he is a party to them." Consistently with this rule it is held that no action will be for procuring a warrant where it remains unserved, Mitchell v. Donanski, 9 L. R. A. 171 (R. I. 1906), Cooper v. Amour, 42 Fed. 215 (1890); nor for an arrest by a policeman without a warrant at the defendant's request. Barry v. Third Ave. Ry., 51 App. Div. 385 (N. Y. 1900); but it has been held, contrary to this rule, that a charge orally made before a magistrate is sufficient prosecution though there be no summons nor warrant. Dawson v. Vansandan, 11 W. R. 516 (Eng. 1863). The following have likewise been held to constitute a prosecution: the filing of an affidavit, Coffey v. Myers, 84 Ind. 105 (1882); issuance of a criminal warrant, though it is not placed in hands of an officer, Holmes v. Johnson, 44 N. C. 44 (1852); holding and committing accused for grand jury, though he is later discharged by failure to indict. Graves v. Dawson, 130 Mass. 78 (1881); Shock v. McChesney, 4 Yeates, 507 (Pa. 1808). See also Stephen's Malicious Prosecution, pp. 8 *et seq.*

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—In an action to recover for the death of a person due to injuries received by being struck by a locomotive, judgment was given for the defendant as the plaintiff failed to prove that there was no contributory negligence. Sanderson v. Chicago, M. & St. P. Ry. Co., 149 N. W. Rep. 188 (Iowa, 1914).

The principal case is in accord with the minority opinion, which is that the burden rests upon the plaintiff to show freedom from contributory negligence. Railroad Co. v. Ayers, 119 Ill. App. 108 (1905); Axelrod v. Ry. Co., 109 N. Y. App. 87 (1905). In these jurisdictions requiring the plaintiff to show the exercise of due care it is nevertheless held that such proof need not be direct, Hinckley v. Ry. Co., 120 Mass. 257 (1876); but may be in-

ferred from the circumstances. Chisholm v. State, 145 N. Y. 246 (1895). Evidence that the injured person was careful on other occasions is not competent to disprove contributory negligence when he is living, Morris v. East Haven, 41 Conn. 254 (1874); but if he is dead, such evidence is admissible if no eye witness can be found. Railroad Co. v. Bailey, 148 Ill. 159 (1893). In these jurisdictions though the burden of proof is upon the plaintiff, he need not expressly aver in his pleading the absence of contributory fault. Fuller v. Ry. Co., 134 Mass. 491 (1883).

The majority view is that contributory negligence is a matter of defence, and that the burden is upon the defendant to prove it. Heiss v. Lancaster, 203 Pa. 260 (1902); Transit Co. v. Behr, 59 N. J. L. 477 (1897). If the plaintiff's evidence raises a presumption of negligence on his part, the burden is cast upon him to prove that he was free from contributory negligence. Cahill v. Ry. Co., 18 S. W. Rep. 2 (Ky. 1891); Cummings v. Reduction Co., 68 Pac. Rep. 852 (Mont. 1902). Ordinarily the question of contributory negligence is for the jury, Iron Co. v. Beck, 112 Ill. App. 444 (1904); but where the plaintiff's own case clearly establishes contributory fault, the matter is one of law for the court, Roberts v. Telephone Co., 66 S. W. Rep. 155 (Mo. 1902), and a nonsuit may be entered by the court. Schmidt v. St. Louis Ry., 149 Mo. 269 (1899).

NUISANCE—PRIVATE NUISANCE—STABLE—A private stable may become a nuisance by reason of the manner in which it is constructed or maintained. Kyser v. Hertzler, 65 So. Rep. 967 (Ala. 1914).

While ordinarily a man may do any lawful act on his own property, he will not be allowed to use his own property to the injury of his neighbor. *"Sic utere tuo ut alienam non laedas."* Thus to use property in such a way as to cause material annoyance, discomfort, or hurt to other persons constitutes a nuisance. Pennsylvania Lead Co.'s Appeal, 96 Pa. 116 (1880); Davis v. Sawyer, 133 Mass. 289 (1882). The fact that the use is a reasonable one from the point of view of the property owner is immaterial. Atty. General v. Cole, 1 Ch. 205 (Eng. 1901). But a lawful use of one's property, no matter how offensive or injurious to others, is never a nuisance *per se*. Canal Co. v. Columbia Park Co., 99 Ill. App. 215 (1900); Corey v. Edgewood Borough, 18 Pa. Super. Ct. 216 (1901). Thus it has been held that a private stable is not a nuisance *per se*. St. James' Church v. Arrington, 36 Ala. 546 (1860); Keiser v. Lovett, 85 Ind. 240 (1882). But it is equally well established that it may become so by reason of the manner in which it is constructed, Rounsaville v. Kohlheim, 68 Ga. 668 (1882); or kept, Rounsaville v. Kahlheim, *supra;* Rodenhausen v. Craven, 141 Pa. 546 (1891); or used, Dargan v. Waddill, 31 N. C. 244 (1848); or because of its proximity to the property of a neighbor, Brewing Co. v. Schmitt, 25 Ohio Cir. Ct. 231 (1903); Gifford v. Hulett, 62 Vt. 342 (1890). Some courts put the right to recovery on the basis of the right to pure air which is incident to the ownership of land, though this right is not always an absolute one. Romano v. Birmingham Ry. Co., 62 So. Rep. 677 (1913). But in no case will an injunction be granted to enjoin the erection of a stable to prevent an anticipated nuisance. Gallagher v. Flury, 99 Md. 181 (1904); St. James' Church v. Arrington, *supra*.

For a full discussion of this subject see Wood on Nuisances, p. 570, §526.

PLEADING—RES JUDICATA—The defence of *res judicata* is not available in a suit in equity unless it has been pleaded. Williams v. Williams, 106 N. E. Rep. 476 (Ill. 1914).

At common law a former judgment between the parties, relied upon as *res judicata,* could be given in evidence under the general issue in assumpsit, trover, ejectment, and trespass on the case. Stafford v. Clark, 2 Bing. 377 (Eng. 1824); Miller v. Manice, 6 Hill, 115 (N. Y. 1843). A reaction, however, took place in England in the early part of the nineteenth century, leading to the establishment of the so-called Hilary rules, Reg. Gen. Hil. T. 4 Wm. IV, 10 Bing. 470 (Eng. 1833), which compelled every matter in discharge of the action to be pleaded specially. This of course included *res*

*judicata.* In the United States, the recent tendency seems to be in the same direction. Either by force of statute, or by judicial decision, a large majority of the late cases prohibit the introduction into evidence of a former judgment unless it has been pleaded. Swamp Land Dist. v. Blumenberg, 156 Cal. 532 (1909); Chattanooga Brwg. Co. v. Smith, 3 Ala. App. 565 (1912); Presbyterian Church v. Trustees, 211 N. Y. 214 (1914); Williams v. Hutton, *etc.*, Co., 80 S. E. Rep. 257 (N. C. 1913). This is so even in assumpsit, Pye v. Wyatt, 151 S. W. Rep. 1086 (Tex. 1912); in ejectment, Feldmeyer v. Werntz, 119 Md. 285 (1912); and in case, McClellan v. Dow Co., 114 Minn. 418 (1911). The rule in the same in equity. Hitt. v. Coal Co., 139 S. W. Rep. 693 (Tenn. 1911); Louisville, *etc.*, R. Co. v. Louisville, 141 Ky. 131 (1910). A few States admit a former adjudication to be shown, either at law or in equity, without being pleaded. Bruner v. Finley, 211 Pa. 74 (1905); Bell v. Niles, 61 Fla. 114 (1911); Passaic Match Co. v. Helio Match Co., 70 Atl. Rep. 466 (N. J. 1908). Some cases hold, however, that a judgment given in evidence under the general issue, when there was an opportunity to plead it, is no conclusive, but only persuasive evidence. Vooght v. Winch, 2 B. & A. 662 (Eng. 1819); Gray v. Pingry, 17 Vt. 419 (1845). Others hold it conclusive. Little Bros. v. Barlow, 37 Fla. 232 (1896); Walker v. Chase, 53 Me. 258 (1865). If a complaint discloses on its face a prior adjudication, there may be a demurrer. Shook v. Shook, 145 S. W. Rep. 699 (Tex. 1912); Ferriman v. Gillespie, 250 Ill. 369 (1911). *Contra,* Adams v. Billingsley, 153 S. W. Rep. 1105 (Ark. 1913).

PROPERTY—FIXTURES—TEMPORARY STRUCTURE—Contractors built a temporary wharf on piles to facilitate the construction of a sea wall. *Held:* That the wharf did not become a fixture. Whether a structure is a fixture or not depends upon the nature of character of the act by which it is erected and the purpose for which it was intended to be used. Hogan Lumber Co. v. City of Oakland, 142 Pac. Rep. 1084 (Cal. 1914).

In determining whether or not a chattel has become a fixture, the controlling element is the intention of the person who affixed the chattel—not the secret intention, but the intention "implied and manifested by his acts". Hopewell Mills v. Taunton Savings Bank, 150 Mass. 519 (1890); Readfield Telephone & Telegraph Co. v. Cyr, 49 Atl. Rep. 1047 (Me. 1901). This intention is determined from the character of the annexation, Lawton Pressed Brick & Tile Co. v. Ross Kellar Triple Pressure Brick Machine Co., 124 Pac. Rep. 43 (Okl. 1912); from the character of the thing annexed, *i. e.,* the nature and adaptation of the articles to the purposes of the land or structure to which it is annexed, Horn v. Clark Hardware Co., 131 Pac. Rep. 405 (Colo. 1913); and from the relation of the party making the annexation to the property. Webb v. New Haven Theatre Co., 87 Conn. 129 (1913). A few cases hold that the mode annexation is the test. Clark v. Hill, 117 N. C. 11 (1895). The modern view, however, is not to regard this as conclusive, but merely as an indication of the intention. Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413 (1897). But if the chattel is so annexed that its removal would materially injure or leave an unfinished gap in the structure, this is a strong indication of the intention to make the chattel a fixture. Gunderson v. Kennedy, 104 Ill. App. 117 (1902). A chattel may be so necessary to the use of a structure, or of such a heavy and permanent character that it becomes a fixture without being actually annexed. Hopewell Mills v. Taunton Savings Bank, *supra;* Monti v. Barnes, L. R. (1901), 1 K. B. 205.

SALES—BREACH OF WARRANTY—WAIVER—A stallion, warranted as a breeder, was sold with the provision that he might be returned within a certain time, if not as guaranteed. *Held:* It was competent for the parties to agree how the purchasers should take advantage of any breach of warranty, and failure to act in accordance with such agreement, by not returning within the prescribed time, precludes the buyers from relying upon the breach of warranty. Hickman v. Richardson, 142 Pac. Rep. 964 (Kan. 1914).

While the general rule is that, in the case of an executed sale of a specific chattel, there can be no rescission for a mere breach of warranty,

there is no legal principle which will prevent the parties from making an agreement, as in the principal case, by which the buyer may return the chattel and rescind the contract, if the goods are not found to be as warranted. Brown v. Russell & Co., 105 Ind. 46 (1885); McCormick Harvesting Co. v. Knoll, 57 Neb. 790 (1899). The buyer, however, to avail himself of his right to return the goods, must comply strictly with the stipulations of the contract as to time and manner of rescission, and failure to do so may result in a loss not only to the right to rescind, but also of an action for breach of warranty. Gray v. Ice Machine Co., 103 Ga. 115 (1897); Nichols Co. v. Caldwell, 20 Ky. Law. Rep. 136 (1904); Sturtevant Co. v. Kingsland Co., 74 N. J. L. 492 (1906). Where the provisions for the return are general, and literal compliance with them under the circumstances is unreasonable or impossible without committing a trespass or breach of the peace, an exception to the general rule is recognized and strict performance on the part of the buyer is not required. Case Machine Co. v. Huber, 160 Mich. 92 (1910).

The general rule, as stated above, where there is no collateral agreement, is that there can be no rescission of an executed sale for breach of warranty, but only an action for damages. Trumbull v. O'Hara, 71 Conn. 172 (1898); Kase v. John, 10 Watts, 107 (Pa. 1840). In some few states, however, there may be a rescission for a breach of warranty, if it be sought within a reasonable time, and the other party be restored to *status quo*. Hodge v. Tufts, 115 Ala. 366 (1896); Smith v. Hale, 158 Mass. 178 (1893).

SALES—CASH SALE—FAILURE TO RECEIVE CASH ON DELIVERY OF GOODS—The contract of sale provided for cash on delivery, but though the purchaser failed to pay, the goods were delivered. The seller did not attempt to reclaim the goods until after the lapse of six months. *Held:* Title has passed to the vendee, and the vendor cannot maintain his action of replevin to recover the goods. Lehman v. People's Furniture Co., 142 Pac. Rep. 986 (Okla. 1914).

It is well recognized that, in cash sales, title passes to the buyer, unless reclamation of the property be made promptly after delivery. Blackentoss v. Speicher, 31 Pa. 324 (1858); Freeport Stone Co. v. Carey's Adm'r, 42 W. Va. 276 (1896); Victor Co. v. Texas State Trust Co., 99 S. W. Rep. 1049 (Tex. 1907). In Frech v. Lewis, 218 Pa. 141 (1907), the principal authority relied upon by the Oklahoma court, it was said, *inter alia*, "The seller cannot continue to hold his right to the goods, and at the same time hold the buyer as his creditor. Continued acquiescence in the buyer's possession of the goods will be taken as a choice on his part to regard the delivery as absolute, notwithstanding the buyer's default." *Accord*, Dupont Co. v. Shields Co., 171 Fed. Rep. 305 (1909).

The courts are not in complete agreement as to the effect of mere delivery in cases of cash sales. Most of the decisions hold that while delivery is some evidence of a waiver, it may be explained by the surrounding circumstances, and that the question of waiver is for the determination of the jury. Peabody v. Maguire, 79 Me. 572 (1887); Adams v. Lumber Co., 159 N. Y. 176 (1899). The courts more readily infer a waiver when the rights of innocent purchasers have intervened. Leatherbury v. Connor, 54 N. J. L. 172 (1891). For a further discussion of the subject of waiver, see Williston's Sales, §346 (ed. 1909), and 9 Mich. L. R. 239.

SEDUCTION—WHO ENTITLED TO SUE—A girl of twenty-two was seduced. She was the adopted daughter of a man and his wife, and performed the domestic duties of their household, though under no express contract of service. The wife sued for damages caused by the seduction. *Held:* That no action lay at the suit of the wife. The action of seduction is based on the relationship of master and servant and not on that of parent and child. As there was no express contract of service, the girl must be deemed to have been in the service of the husband. Peters v. Jones, 110 Law Times, 937 (Eng. 1914).

The general rule that the action may be brought by the father or some other person standing in *loco parentis* to the woman seduced, is based entirely upon the relation of master and servant. Thus if the daughter lives with the father as a member of his family, and she performs services for him, or if he at least has a right to command her services, he can maintain an action against the seducer. Scarlett v. Norwood, 115 N. C. 284 (1894); Clark v. Clark, 63 N. J. L. 1 (1899); Mohry v. Hoffman, 86 Pa. 358 (1878). The relationship of parent and child gives rise to the legal fiction that there is an implied contract of service only when the child resides with the parent. The action is maintainable where the daughter is under twenty-one without any proof of actual service; but after that age is passed there must be proof of actual service. Haggerty v. Finnerty (1905), 2 I. R. 552; Kennedy v. Shea, 110 Mass. 147 (1872); Snider v. Newell, 132 N. C. 614 (1903). A mother cannot bring the action during the lifetime of the father. Patterson v. Thompson, 24 Ark. 55 (1896); Logan v. Murray, 6 S. & R. 175 (Pa. 1820); but she may if the seduction occurred after his death. Abraham v. Kidney, 104 Mass. 226 (1868); Anderson v. Rigg, 64 N. J. L. 407 (1900), or if the husband resides out of the state. Abbott v. Hancock, 123 N. C. 99 (1898). In Pennsylvania the mother can maintain the action only by proving actual service at the time of seduction. Dunlop v. Linton, 144 Pa. 335 (1890); Femsler v. Moyer, 3 W. & S. 416 (Pa. 1842). As a bastard has, in the eye of the law, no father, the mother as the only parent, has the right of action for the seduction. Hobson v. Fullerton, 4 Ill. App. 282 (1879); Muckleroy v. Bunham, 1 U. C. Q. B. 351 (Canada, 1894). The husband may sue if he adopts the illegitimate daughter of his wife. Bracy v. Kible, 31 Barb. 273 (N. Y. 1857).

The right of action is not strictly confined to the natural parents of the woman seduced, but may be sustained by a person who stands *in loco parentis* to her. Thus the action may be brought by the woman's guardian. Case v. Smith, 107 Mich. 416 (1896); Blanchard v. Ilsley, 120 Mass. 487 (1876); by her brother, Paterson v. Wilcox, 20 U. C. C. P. 385 (Canada, 1900); by her brother-in-law, Wilson v. Sproul, 3 Pr. W. 49 (Pa. 1840); by her grandfather, Cestwell v. Hoyt, 6 Hun, 575 (N. Y. 1876); by her aunt or uncle, Emery v. Gowen, 4 Me. 33 (1844); Abernethy v. McPherson, 26 U. C. C. P. 516 (Canada, 1903); by her cousin, Davidson v. Goodall, 18 N. H. 423 (1846); by her stepfather, Kinney v. Langhenour, 89 N. C. 365 (1880); Bartley v. Richtmeyer, 4 N. Y. 38 (1850); by her father by adoption, Irvin v. Dearman, 11 East, 23 (Eng. 1810); Nickells v. Goulding, 21 U. C. Q. B. 366 (Canada, 1901); subject of course to the same restrictions and requirements as would obtain were the action brought by the father of the seduced. The woman herself is not entitled to maintain any action for her own seduction unless it is so provided by statute, Heap v. Dunham, 95 Ill. 583 (1880); Weaver v. Bachert, 2 Pa. 80 (1845).

The basis of the action being the loss by the master of the services of his servant, it is true that, even independently of any blood relationship or family connection, the master of the woman seduced has a right of action for her seduction if he has been deprived of her services in consequence thereof. Ball v. Bruce, 21 Ill. 161 (1859); Howland v. Howland, 114 Mass. 517 (1872); Graham v. Wallace, 50 N. Y. App. Div. 101 (1888). Thus the principal case is in accord with the general law.

SCHOOLS—DISMISSAL OF TEACHER—WHAT IS NEGLECT OF DUTY—A State charter forbid the removal of public school teachers except "for gross misconduct, insubordination, neglect of duty or general inefficiency." A married teacher absented herself from duty for three months for the purpose of bearing a child. A by-law of the board of education provided that the absence of a teacher is excusable in case of serious personal illness. *Held:* Her absence was such a neglect of duty as authorized her dismissal and that mandamus would not lie to compel her reinstatement. People v. Board of Education, 106 N. E. Rep. 307 (N. Y. 1914).

Mandamus is the proper remedy to restore a teacher in the public school to a right given by express law from which she is unlawfully precluded. Kennedy v. Board of Education, 82 Cal. 483 (1890). But the general rule is that mandamus will not lie to review the determination of public boards or officers in involving the exercise of discretions or judgment, if they have proceeded within their jurisdiction and in substantial compliance with the law. People v. State Racing Committee, 190 N. Y. 31 (1907). To that rule, however, there is the well recognized exception that the action of the officer must not be capricious or arbitrary, and if such be the character of the reason for refusing to act the writ will lie. Illinois State Board of Dental Examiners v. People, 123 Ill. 227 (1887), and the fact that another teacher has been placed in the position from which the teacher had been dismissed does not affect her right to maintain the action. Kennedy v. Board of Education, *supra*.

A short dissenting opinion was written by Mr. Chief Justice Bartlett, in which he took the view that the absence for the purpose of bearing a child did not constitute neglect of duty and therefore the board of education was without power or jurisdiction to remove the teacher. It is not easy to understand on what theory to support the conclusion reached by the majority of the court in the principal case. It would seem that the soundness of the decision may well be doubted as maternity, requiring occasional absences at periods of childbirth, is a natural consequence of the employment of potential mothers as teachers.

SPECIFIC PERFORMANCE—CONSIDERATION—ADEQUACY—The plaintiff, at the request of his mother, the defendant, consented to continue to assist in maintaining their household, in consideration of the latter's oral agreement to convey to him a tract of land, worth at least $6000, for which it was stipulated that he was to give a mortgage thereon for $2000 with five per cent. interest payable annually during the life of the defendant, who was then sixty-five years old. The plaintiff had the option of paying the principal at any time, but the mortgage was to be void after the defendant's death. The plaintiff occupied the land, used manure thereon worth $300, constructed an artesian well, and made repairs worth more than $200. *Held:* Even if the defendant has the right to demand payment of $2000, this sum is so much below the real value of the land that the transaction is substantially a gift, the annual payment of interest being presumably satisfied out of the rents and profits. Specific performance refused. Reich v. Reich, 91 Atl. Rep. 899 (N. J. 1914).

The rule of the weight of authority is that mere inadequacy of consideration is not alone a sufficient ground for refusing specific performance, unless the inadequacy is "such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud." Coles v. Trecothick, 9 Ves. 234 (Eng. 1804); Cathcart v. Robinson, 5 Pet. 263 (U. S. 1831); *contra*, by statute, Fleishman v. Woods, 135 Cal. 256 (1901). According to the early view in England and the United States, inadequacy of consideration was a particular instance of unfairness or hardship and was therefore a basis for refusal of specific performance, irrespective of fraud. Day v. Newman, 2 Cox. 77 (Eng. 1788); Dodd v. Seymour, 21 Conn. 476 (1852). Inadequacy determined as of the time when the contract was made is an ingredient, which when associated with other inequitable incidents, will contribute to prevent specific performance. Lee v. Kirby, 104 Mass. 420 (1870). In order to obtain specific performance, there must be a valuable consideration such as is necessary to support a contract at law. Stubbings v. Durham, 210 Ill. 542 (1904); Boles v. Caudle, 133 N. C. 528 (1903). A promise for a promise is sufficient. Perry v. Stephens, 66 N. Y. 321 (1876); *contra*, Winter v. Goelner, 2 Colo. App. 259 (1892). An agreement to convey a right of way was specifically enforced, although the consideration was only a dollar. Ala. C. R. Co. v. Long, 158 Ala. 301 (1908). Most courts, however, hold that a dollar is merely a nominal and not a valuable consideration. Rude v. Levy, 43 Colo. 482 (1908); Berry v. Frisbie, 120 Ky. 337 (1905). Equity will not enforce an

agreement to pay a certain sum, in consideration of the payment of a smaller sum. Richardson v. Barrick, 16 Ia. 407 (1864). Specific performance of a contract to convey in consideration of $13,000 one-fifth of all the property which might be acquired at any future time was refused, although the defendant had nothing at the time of the making of the contract but subsequently acquired $750,000. Marks v. Gates, 83 C. C. A. 321 (1907). As in the principal case, the nominal character of the consideration may, in connection with other facts, tend to show that the transaction was not a sale but an incomplete gift which is of course unenforceable. Callaghan v. Callaghan, 8 Cl. & Fin. 374 (Eng. 1841). Thus, an agreement to convey a plantation "in consideration of payment" from the profits thereof has been held to lack consideration and to be merely a gift. Dorsey v. Packwood, 53 U. S. 126 (1851).

TELEGRAPH COMPANIES—DELIVERY OF FORGED TELEGRAM—LIABILITY TO ADDRESSEE—A bank was allowed to recover in a tort action the damages suffered in consequence of the delivery of forged telegrams. State Bank of Commerce of Clayton v. W. U. Tel. Co., 142 Pac. Rep. 156 (New Mex. 1914).

This case is accord with the general rule that a *prima facie* case is established by proof of damages proximately caused by reliance upon a message, delivered by a telegraph company, purporting to come from but not in fact sent by a person in whose name it is signed. However, since a telegraph company is not an insurer of the accuracy of a message, there can be no recovery if it prove that reasonable care has been exercised in the receipt and transmission of the telegram. Wells v. W. U. Tel. Co., 144 Ia. 605 (1909); W. U. Tel. Co. v. Uvalde, 97 Tex. 219 (1904). In the latter case, a forged message was sent by wire-tappers and the telegraph company was held liable for failure to safeguard against such interference. *A fortiori*, where a telegraph operator, employed by the company, is the author of the forged telegram, the latter is liable. Magourick v. W. U. Tel. Co., 79 Miss. 632 (1902).

Ordinarily, there is no obligation upon a telegraph company to investigate the identity of the sender of a message. But where there are circumstances which would ordinarily arouse suspicion of impersonation or want of authority, there is a duty to communicate the suspicious facts to the addressee. Elwood v. W. U. Tel. Co., 45 N. Y. 549 (1871). It has been held that if a person fraudulently using the name of another, sends a telegram requesting money to a person, who, in response to the request, sends money by telegraph, the addressee cannot recover from the company, if there were no circumstances which would excite suspicion in the mind of an ordinarily careful man. W. U. Tel. Co. v. Meyer, 61 Ala. 158 (1878).

TROVER AND CONVERSION—MEASURE OF DAMAGES—In the absence of special circumstances, the measure of damages for conversion is the value of the property at the time of the conversion plus interest, with no compensation for the use or hire of the property. Martinez v. Vigil, 142 Pac. Rep. 920 (N. Mex. 1914).

In an action of trover for the conversion of personal property where the goods are not returned to the rightful owner, the measure of damages is as stated in the principal case. This is the English rule and is followed everywhere in the United States. Watson v. McLean, 1 E. B. and E. 75 (Eng. 1858); Beecher v. Denniston, 13 Gray, 354 (Mass. 1859); Perrin v. Wells, 155 Pa. 299 (1893); Texarkana Water Co. v. Kizer, 63 S. W. Rep. 913 (Tex. 1901). So also if the conversion of part of an article renders the rest worthless for all purposes, the value of the whole may be recovered. Walker v. Johnson, 28 Minn. 147 (1881). This is based on the theory that a conversion consists of a wrongful transfer of title at a certain definite time. Backentoss v. Stahler, 33 Pa. 251 (1859). Ordinarily the plaintiff can not recover the value of the use or hire, because he is suing for the value of the goods when taken from his possession, as though it were a case of a forced sale. Cutler v. Goold Co., 43 Hun, 516 (N. Y. 1887); Texarkana Water

Co. v. Kizer, *supra;* Ewing v. Blount, 20 Ala. 694 (1852); Hill v. Canfield, 56 Pa. 454 (1867); Govin v. de Miranda, 140 N. Y. 474 (1893). The theory is that the value of the goods at the time of the conversion with interest is the value of the goods themselves. Sutherland on Damages (3rd ed.), vol. 4, §1139; Sedgwick on Damages (9th ed.), vol. 2, §493a. But where the goods are restored to the rightful owner, the measure of damages is a reasonable compensation for the use of the property. The plaintiff is then considered as the owner of property suing for the loss occasioned by the wrongful deprivation of its use. Ewing v. Blount, *supra;* Shotwell v. Wendover, 1 Johns. Sup. Ct. Reps. 64 (N. Y. 1806). Damages for deterioration are also allowed. Shotwell v. Wendover, *supra.* Statutes in some states have greatly broadened the field of the general rules. Pridgin v. Strickland, 8 Tex. 427 (1852); Martin v. Oslin, 94 Ga. 658 (1894); Hawkins v. Kansas City Co., 63 Mo. App. 64 (1895).

TRUSTS — TERMINATION — PURPOSE ACCOMPLISHED — A parent, whose daughter had married a dissipated man, devised property in trust for her use during the life of her husband, and upon his death to be turned over to her absolutely. The daughter procured a divorce. *Held:* The trust was terminated, for the divorce effectually accomplished the purpose of the testator. *In re* Cornil's Estate, 149 N. W. Rep. 65 (Iowa, 1914).

It is well established that equity will terminate a trust if the object for which it was created has ceased to exist. Culbertson's Appeal, 76 Pa. 145 (1874), even if the time for the termination fixed by the testator has not arrived. Wayman v. Follansbee, 253 Ill. 602 (1912). The courts have uniformly held, under the facts of the principal case, that the sole object of the trust was to protect the property from the husband, and that the divorce of the parties achieved this object as completely as the death of the husband would have done. Koenig's Appeal, 57 Pa. 352 (1868); Rittenhouse v. Hicks, 10 Ohio Dec. 759 (1890). The authorities do not seriously consider the possibility that the testator's purpose may be defeated by the remarriage of the divorced parties. Carey v. Slead, 220 Ill. 508 (1906), where the court said, *inter alia,* "We do not feel at liberty to assume that an event so improbable will occur or that a possibility of that kind would be a sufficient ground for giving a different construction to the will." The courts likewise find no difficulty in awarding the property to the beneficiary, although her children have a contingent interest under the will. *In re* Lee's Estate, 207 Pa. 218 (1903).

VENDOR AND PURCHASER—CONVEYANCE TO THIRD PARTY SUBJECT TO OPTION—When an option to purchase any real property has been given, the owner of the premises has an estate therein which he can transfer, and the party accepting the title, if he has notice or knowledge of the privilege conferred by the option, necessarily takes the premises *cum onere.* Fargo v. Wade, 142 Pac. Rep. 830 (Or. 1914).

In accordance with the principal case, the subsequent conveyance of the land by the optioner does not revoke the option, but the grantee having knowledge of the option, takes the land subject to the equitable estate already vested in the optionee. Cummins v. Beavers, 103 Va. 230 (1904). The optioner "does not sell his lands; he does not agree to sell it, but he does then sell something, viz., the right, or privilege to buy at the election or option, of the other party. . . . The owner parts with his right to sell his lands (except to the second party) for a limited period." Ide v. Lieser, 10 Mont. 5 (1890). Unlimited restrictions upon the right of alienation have been considered as against the general policy of the law, and the language of the dicta in the case quoted. "The owner parts with his right to sell the lands (except to the second party) for a limited period" should not be construed to mean that there could not be a disposition of the owner's rights in the property subject to the option contract. Elliot v. Delaney, 217 Mo. 14 (1909). Similarly, death of the vendor does not vitiate the option contract and the optionee is entitled to specific performance of the contract against the decedent't heirs. Mueller v. Nortman, 116 Wis. 468 (1903).